SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, ~~1948~~ 1949

No. ~~[illegible]~~ 53

LAWRENCE C. KINGSLAND, COMMISSIONER OF PATENTS,

Petitioner,

vs.

VERNON M. DORSEY

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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No. 729

LAWRENCE C. KINGSLAND, COMMISSIONER OF PATENTS,

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vs.

VERNON M. DORSEY,

Respondent

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Opinions Below

The opinion of the United States District Court for the District of Columbia is reported in 69 Fed. Supp. 788, 803, and will be found on pages 24 et seq. of the record. The opinion of the United States Court of Appeals for the District of Columbia is not yet reported but will be found on pages 141 et seq. of the record.

Jurisdiction

The judgment of the Court below was entered on January 26, 1949 (R. 156). The jurisdiction of this Court is invoked under Title 28, U. S. C. Section 1254(1).

Statutes Involved

Title 35 U. S. C. Section 11. It is as set forth on pages 2 and 3 of the Petition for Writ of Certiorari herein.

Questions Presented

1. Whether an ordinary Patent Office disbarment proceeding should be reviewed in this Court where a special statute particularly provided for its review in the United States District Court for the District of Columbia and where that review was conducted in accordance with settled practice governing disbarment proceedings.

2. Did the opinion of this Court in *Hazel Atlas* v. *Hartford*, 322 U. S. 238, compel a conclusion of gross misconduct committed by this respondent as a member of the Patent Bar, where the record disclosed but a minimal connection by him with the misconduct charged and then as local associate counsel for a time but never as general counsel in control of the case?

3. Whether the disbarment of respondent in the United States Patent Office was unjustified on the evidence produced against him, as found by the Court below in the exercise of its jurisdiction to review under the Statute and settled law governing such proceedings?

4. Should this Court reexamine this voluminous record of an ordinary Patent Office disbarment proceeding involving conduct in 1926, when the hearing was held in 1944, and the record discloses that those responsible for the misconduct charged have been disbarred and respondent's connection was minimal, and the proof, after almost two decades, showed his conduct has never been questioned either before or after the charges preferred against him?

Argument

Among the many reasons why this Court should deny the Writ of Certiorari are:

I

Nothing is involved in this case but a question of fact. The Court below disposed of this question.

II

The United States District Court for the District of Columbia and the United States Court of Appeals for the District of Columbia are the proper tribunals to eview the disbarment proceedings originally initiated herein and this is sufficient review.

Congress has by statute provided for review in the lower tribunals, Title 35 U. S. C. Section 11. The pronouncements of this Court discourage review by this Court in cases of local law. A fortiori, in cases where Congress has placed review of factual situations in the lower federal tribunals this Court will not review.

In *Busby* v. *Electric Utilities Employees Union*, 323 U. S. 75, 77, 89 L. E. 79, 80, this Court held that:

> "Only in exceptional cases will this Court review a determination of such a question (i.e. questions of local law of the jurisdiction over which it presides) by the Court of Appeals for the District of Columbia."

This court also said (page 79):

> "By rule 81(e), the law of the state in proceedings in the District Court of the United States for the District of Columbia (now United States District Court for the District of Columbia) is the law applied in the District of Columbia. That law is derived from * * * statutes of Congress."

See also *Griffin* v. *U. S.*, 17 L. W. 4374, #417, Oct. Term 1948.

Congress has vested review of Patent Office disbarment proceedings in the United States District Court for the District of Columbia (U. S. C. Title 35, Section 11). They are not reviewable in any other Federal District Court. All final orders of the District Court are reviewable in the United States Court of Appeals for the District of Columbia. Title 17, Section 101 D. C. Code (1940); Title 11, Section 205 D. C. Code (1940).

The Petition herein (page 16), in overstressing for review of this purely local matter, limns the position of the Court below for reviewing disbarment proceedings of the Patent Office as strategic. It points this comment as one of the reasons why the supervisory authority of this Court should be exercised in this case. The statute created no such distinction. As early as 1861, 12 Stat. at Large 247, disbarment of patent practitioners was made subject to the approval of the President. In the Patent Acts of 1870 and again in 1874, approval of the Secretary of the Interior was substituted for Presidential action. U. S. Code, Title 35, Section 11, the statute involved herein, provided for a *judicial* review of such disbarments in the United States District Court for the District of Columbia. While this Court may exercise supervisory jurisdiction over a Federal Court in the District of Columbia, it will do so only in such exceptional circumstances as mentioned in *Busby* v. *Electric Utilities Employees Union* and *Griffin* v. *United States*, *supra*, and no such circumstances exist in this case. Nothing distinguishes this disbarment proceeding from those which the Court below is called upon frequently to review where disbarment has been pronounced against practitioners before the bars of the various other Courts within its jurisdiction.

III

The Staleness of the Charges

Pursuant to Title 35, Section 11 U. S. C., which provides that the Commissioner of Patents may exclude from further practice one guilty of gross misconduct, the respondent, Dorsey, was permanently disbarred. However, some of the members of the same Committee on Disbarment thought his suspension for a year sufficient. And the United States District Court for the District of Columbia, in affirming, said:

> "It is indeed tragic that the severe penalty of disbarment should be visited upon this petitioner for the acts of such distance in the past." 69 Fed. Supp. 788, 803 (R. 47-48).

The Court of Appeals reversed. It criticized respondent's disbarment by the Patent Office.

The conduct complained of is alleged to have occurred in 1926. Prosecution began in 1944. Two decades, almost, is too long a lapse under this voluminous record and should indicate appropriate caution in the prosecution of serious charges so stale, against one whose career at the patent bar had been without blemish for over half a century before and after the misconduct alleged. The memory of witnesses cognizant of the facts is then necessarily faulty if indeed dependable at all, and reliable evidence to prove grave professional delinquency with satisfying persuasion fades into dangerous acceptance, particularly where, as here, the evidence against Dorsey lay in that realm of fading memory and not in documentary proof.

As to the office of an attorney, this Court in *Bradley* v. *Fisher*, 80 U. S. 335, 20 L. E. 647, 652, said:

> "Admission as an attorney is not obtained without years of labor and study. The office which the party

thus acquires is one of value, and often becomes the source of great honor and emolument of its possessor. To most persons who enter the profession, it is the means of support to themselves and their families. To deprive one of an office of this character would often be to decree poverty to himself and destitution to his family. A removal from the Bar should, therefore, never be decreed when any punishment less severe—such as reprimand, temporary suspension or fine—would accomplish the end desired."

Although the Statute of Limitations does not apply in disbarment proceedings, Courts have condemned the bringing of stale charges. See Annotation in L. R. A. 1915D, 1218; 45 A. L. R. 1111.

The language of the Court in the case of *In Re Adriaans*, 28 App. D. C. 515, 524, is pertinent here.

"The power to disbar ought always to be exercised with great caution and only in clear cases. No criminal proceedings on this account were commenced against this respondent, and after this long delay we cannot agree with the court that the matters disclosed by this record suffice to sustain this order. *This is not a criminal proceeding, but such a charge should be supported by a preponderance of satisfactory evidence.* The case should be clear and free from doubt. The career of an unworthy member of the bar is apt to reveal misconduct more recent than in this case, where the proof is legally insufficient to disbar this respondent on account of an offense alleged to have been committed about twelve years ago." (Italics supplied.)

IV

Dorsey's Connection With Hazel Atlas v. Hartford Disproves Petitioner's Claim That the Decision Below Conflicts With the Ruling of This Court.

Petitioner's brief relies almost exclusively upon the claim that the Court below ignored the decision of this

Court in *Hazel Atlas* v. *Hartford, supra*. It did no such thing. Dorsey was not a party to those proceedings. The misconduct condemned by this Court in that case contained no reference to him whatsoever. It made no allocation of responsibility for the fraud. It could not. Nevertheless, four patent practitioners were ordered disbarred. They were Brown, Carter, Hatch and Dorsey. Brown died almost immediately after his order of his disbarment. The remaining three petitioned the District Court for review. The District Court affirmed. Only Dorsey, however, now 80 years of age and a member of the bar for 59 years and who asserted and continuously relied upon his complete innocence of any wrongdoing, appealed. He prevailed. The District Court had proceeded in its review on the erroneous theory that it must follow the substantial evidence rule of administrative tribunals, notwithstanding it was proceeding under a particular statute which gave it power of full review.

The Rule to Show Cause why he should not be disbarred, issued against Dorsey by the Patent Office, recites only that he participated in the preparation of the Clarke article and presented it at the hearing on the patent application (R. 13).

Dorsey's connection with the Hazel Atlas transaction and the testimony produced at the disbarment hearing relative to his participation therein substantially appears on pages 94 to 104 of this record.

The language of the Court below relative to Dorsey's participation is appropriate.

> "It is our opinion that appellant was disbarred by the then Commissioner without substantial probative evidence on any of the five points in which he was found guilty and without any evidence at all on some of them. Some of the allegations on which the Committee found Dorsey guilty were so puerile they should have been summarily stricken by the Commissioner and, failing that, by the trial court.

> The so-called Board (spoken of in appellee's brief as sacrosanct) especially disclaimed any controlling influence from the decision of the Supreme Court in *Hazel Atlas Glass Co. v. Hartford Empire Co.*, 322 U. S. 238, 64 S. Ct. 997, or by the decisions of the Third Circuit Court of Appeals. This disclaimer was obviously necessary because Dorsey was not a party to any of these suits, had no opportunity to appear and defend himself and is in no sense bound by them. Even the able Special Counsel could not escape this necessity as witness his strident disclaimer. (App. Br. 33). *Even he had to admit that there was nothing in these opinions to establish individual guilt on the part of Dorsey.*" (Italics supplied.) (R. 148.)

The Petition, page 17, criticizes the test of good faith applied by the Court below to Dorsey and compares it with the language of this Court in the *Atlas* case, namely,

> "The article even if true should have stood or fallen under the only title it could honestly be given, that of a brief prepared by Hartford's agents, attorneys and collaborators. 322 U. S. 247."

This language does not stigmatize with guilt all or any who may have been a Hartford agent, attorney or collaborator. This Court never intended that its language should be distorted into a conviction without a hearing of any one whom some prosecutor later might cast as a respondent because he was found to be within the range of the categories mentioned. Neither can this language be interpreted into such a violent denial of due process that any hearing, later given, must be ineffectual and *pro forma*, upon the question of the guilt or innocence of such a one, because of the language used by this Court. Fairly read, all this Court intended to state was that any Hartford agent, attorney or collaborator who knowingly and with intent engaged him-

self in (a) the preparation of an article by the employees of Hartford, (b) the persuasion by Hartford of Clarke to sponsor that article, (c) the publication of the article by Hartford as the composition of Clarke, (d) the filing of the article in the Patent Office as his with the intent to influence the action of the Patent Office was guilty of perpetrating a serious fraud upon the Patent Office. And the subsequent payment of a large sum of money to Clarke, evidently to suppress the facts about the origin of the article gave persuasive color to the conduct of those concerned therein as fraudulent and evil. Without this payment in proof, it is doubtful if the disbarment of anyone could have been justified. Serious mistakes of judgment, honestly made, can hardly warrant the extreme penalty of disbarment. When, however, fraudulent purpose, intent, and combination vitalize the evil to be found in otherwise questionably immoral and unethical practice, then the mind moves away from doubt into certainty. And the resultant sanction which such conduct merits engages more serious punishment. But Dorsey knew nothing of any payment to Clarke,—any more than those who prosecuted or sat in judgment on him. He did not participate in any of the recited acts except the filing of the article in the Patent Office as one written by Clarke,—and he did this under his belief that it was written by Clarke. He was without knowledge of any of the other conspiratorial acts. His good faith, therefore, was measured by a different rule than that to be applied to members of the general conspiracy,—and rightly so. Both the District Court and the Court below found there was no evidence that Dorsey participated in, or knew of, the payment of any money to Clarke. And that was one of the crucial grounds,—if not a controlling one, upon which disbarment was sought (R. 42-154).

Insofar as the petition alleges (page 20):

> "Dorsey was a party to the original discussion which resulted in the Clarke article.",

all Dorsey did was to change two or three words in a manuscript sent him by Hatch. That was not the same manuscript Hatch submitted to Clarke and which this Court condemned (R. 106, 109, 113, 114 and 115).

The petition (p. 20) continues:

> "Hatch testified that Mr. Dorsey knew what was going on."

This testimony was not in this disbarment proceeding. It was given by Hatch in certain Anti-Trust proceedings in the Federal District Court in Ohio. Dorsey was not a party to those proceedings. His testimony in that case is continued on page 128 of the record. Obviously he could not cross-examine Hatch in that case and obviously cannot be bound by that testimony. In this case, Hatch testified (R. 49):

> "Q. Did you get any help from Mr. Brown on it?
>
> . . . . . .
>
> "Q. How about Mr. Dorsey?
>
> "A. Yes, he put two words in it I think and very likely he may have given me some advice. I may have discussed it with him, but as to anything he did I think there were two words he put in."

Such testimony cannot be in quantum or quality the basis for disbarment, particularly where Dorsey testified that he never discussed the Hatch article or the Clarke article with Hatch (R. 104), and gave fully his complete knowledge of and connection with the article and the entire case.

V

Discussion

This is a factual case and nothing else. It would unduly burden this Court to review and analyze the testimony contained in several printed volumes on file with its Clerk. Respondents have printed Dorsey's minuscule connection therewith (R. 94 et seq.). It contains nothing which would warrant his disbarment. No novel or important questions of law, indeed no questions of law of any nature, are involved. The District Court believed that, where an administrative agency had ruled, it was bound by the conclusion of the agency. This was error. The Court below gave the judicial review prescribed by statute.

Dorsey's disbarment by the Patent Office was unjustified. It was pronounced in a harsh denial of every protective presumption of the law in his favor. While a formal hearing was set up, its effectiveness as an instrumentality to assess responsibility for conduct wisely was nullified, as to him, by the erroneous interpretation of the language of this Court in the *Hazel Atlas* case supra and the goad which the Committee and the Commissioner construed that decision to be to find guilty anyone and everyone who was ever a Hartford agent, attorney or collaborator, regardless of his guilty knowledge and intent. Dorsey's innocence has been found after a painstaking and tedious analysis of a long and tiring record by the Court authorized by Congress to make that determination. To re-review that determination now would be needlessly a wearisome task. It would invite the retangling over again of a web of suspicion, in the hope this time to make the web tight enough to prevent escape through its close-drawn meshes of even the most irreproachable acts. It would imperil the security of many lawyers, situated as Dorsey was in this case. He was, as it has

been shown, for a time local, associate counsel. His principals were miles away from him. He had no knowledge of what they were doing. He had confidence and trust in them and in their conduct of a cause over which they were the general counsel. He had a right to put trust and confidence in them. He was justified in his reliance. Until something occurred to change his opinion, his position as local was subordinate to that of general counsel, who he believed would ethically and unimpeachably perform their duties as lawyers, to the best interest of their client to be sure but always honorably and within the demands of rectitude. As local counsel, his engagement did not indicate he should act with suspicion in the matters entrusted to him of the motives, methods, means or purposes of the general counsel who engaged his services. Any lawyer of experience who has been engaged as Dorsey was in this case appreciates fully and understands Dorsey's predicament in the unfortunate situation which developed. Washington as the capital of the Nation increasingly requires relationships between local and distant attorneys. The plain lessons experience has taught of the character which those relationships have developed ought not to be lost in a subjection of their existence to tests which lack understanding and vision and which ultimately will result in making their formation too dangerous longer to be practiced or adopted. We think that lurking behind the present Petition is irritation at the language used by the Court below. But this Court obviously cannot concern itself with matters of rhetoric or the quantum of judicial condemnation shown in a lower Court's opinion. This Court does not review a factual situation except in extraordinary circumstances. They do not exist here. *Crowell* v. *Benson*, 285 U. S. 22, 65.

Conclusion

The Petition should be denied.

Respectfully submitted,

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